

In the Supreme Court of Florida

In the matter of use by the trial courts  
of the Standard Jury Instructions  
(Criminal Cases)

---

Case No. SC 03-

Supplemental Report (No. 2003-1) of the  
Committee on Standard Jury Instructions (Criminal)

To the Chief Justice and Justices of  
the Supreme Court of Florida:

This supplemental report regarding proposed amendments to the Florida Standard Jury Instructions in Criminal Cases is filed pursuant to article V, section 2(a), Florida Constitution.

The committee proposes the following amendments to the instructions as printed by The Florida Bar under Florida Rule of Criminal Procedure 3.985:

- Proposal 1. Revised instructions on drug abuse offenses
- Proposal 2. Revised instructions for offenses based on lewd and lascivious behavior
- Proposal 3. Revised instruction on justifiable use of force by law enforcement
- Proposal 4. Removal of an obsolescent drug abuse instruction

The proposed amendments are provided in Appendix A. Proposals 1 and 2 were published on pages 14 through 19 of the September 15, 2002, issue of The Florida Bar News. Proposal 3 was published on page 11 of the November 1, 2002, issue. Copies of the Bar News notices are provided in Appendix B. No comments were received in response to either publication. Relevant excerpts from the committee's minutes are attached at Appendix C. Materials considered by the committee on the proposals are provided in Appendix D.

Respectfully submitted,

---

Dedee Costello  
Chair, Supreme Court Committee on  
Standard Jury Instructions in Criminal Cases  
Florida Bar Number 150904

## Explanation of Proposals

### Proposal 1. Revised instructions on drug abuse offenses

The committee initiated its review of the drug abuse instructions in response to *Scott v. State*, 808 So. 2d 166 (Fla. 2002), and the court's referral based on *Scott*. See Appendix D, pages 2 and 3. A short time before the committee was to meet to discuss the instruction, the legislature passed chapter 2002-258, Laws of Florida, effective May 13, 2002, which created section 893.101, Florida Statutes. That law states as follows:

#### **893.101 Legislative findings and intent.--**

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

History.--s. 1, ch. 2002-258.

At its meeting on April 5, 2002, the committee decided that no changes in the instructions were needed based on *Scott* but that the instructions needed to be reviewed and revised in light of the new law. Of particular concern was the requirement that the jury be instructed on the "permissive presumption" of knowledge of the illicit nature of the substance possessed by the defendant.

At its meeting on July 19, 2002, the committee considered the suggestions of Professor John Yetter. See Appendix D, pages 4 through 10. The specific suggestions were as follows:

A. Throughout the instructions for the various offenses in chapter 893 there is a standard explanation of constructive possession that includes the requirement “the state must prove the person’s . . . (3)knowledge of the illicit nature of the thing.” This was based on *Chicone v. State* and should be deleted.

B. References to an additional instruction based on *Medlin v. State*, 273 So. 2d 394 (Fla. 1973) should be deleted. [This refers to an instruction to the effect that knowledge of illicit nature of the substance may be inferred from proof of actual possession, as opposed to constructive possession, of the substance.]

C. In the trafficking offenses, element #4 requiring proof of knowledge of the identity of the substance should be deleted. [The requirement of proof of element #4 in trafficking charges was added in *Dominguez v. State*, 509 So. 2d 917 (Fla. 1987), which based its holding on the statutory requirement that the defendant act “knowingly.” It is arguable whether this element should be eliminated to conform to the statute.]

D. The following instruction should be added to the possession and trafficking offenses:

*Give if applicable - F.S 893.101(2) and (3)*

**An issue in this case is whether [defendant] knew of the illicit nature of the [controlled substance alleged in the charge]. Lack of knowledge of the illicit nature of the [controlled substance] is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the [controlled substance alleged in the charge] may justify a finding that the defendant knew of its illicit nature if, from all of the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

The committee agreed in principle to most of the suggested changes and subsequently reviewed and approved a draft of the revised instructions, which were then published for comment in the September 15 issue of The Florida Bar News. See Appendix B, pages 2 to 6. The committee again discussed the revisions at its

meeting on November 15, 2002. Having received no comments in response to the publication and without dissent of any members, the committee decided that the revised instructions should be submitted to the court.

The revised instructions are intended to be used in cases to which section 893.101, Florida Statutes, applies. Issues about retrospective application of section 893.101 may be arguable, see *State v. Ruiz*, Case Numbers 02-389 and 02-524, but the committee is unaware of any case law to support an argument that 893.101 is unconstitutional.

Subsection (2) of the statute states that it applies to all offenses under chapter 893. The committee therefore has applied 893.101 to all chapter 893 instructions. Each instruction is amended by adding two paragraphs, one concerning the defense of lack of knowledge of the illicit nature of the substance and the other concerning the permissive presumption of knowledge provided by the statute. The reference to *Chicone v. State*, 684 So. 2d 786 (Fla. 1996), and the requirement that the state prove the knowledge of illicit nature have been removed from each.

In applying the statute to trafficking offenses as well as to possession offenses, the committee discussed the issue of whether section 893.101 removes the knowledge element that was added to the trafficking instructions by *Dominguez v. State*, 509 So. 2d 917 (Fla. 1987). That opinion requires instructing the jury on whether the defendant “**knew that the substance was** [(specific substance alleged)].” As Professor Yetter’s recommendation (D) above suggests, the statute could be interpreted to require removal of that element from the trafficking instructions. The committee, however, decided that, because the statute does not mention *Dominguez* and because a distinction can be drawn between lack of knowledge about the name of a substance and lack of knowledge about the illicit nature of that substance, section 893.101 does not remove the *Dominguez* element. That is, at least with some of the more exotic controlled substances, or those substances recently added by legislative amendment, a plausible defense could be that the accused was aware of the chemical identity of the substance but was unaware of its illicit nature. In such a case, proving the element of knowledge would not of necessity exclude the affirmative defense.

In addition to the section 893.101 revisions, the committee includes some housekeeping amendments to some of the instructions. The committee has updated the trafficking instructions (25.9 through 25.13) to provide the current proscribed amounts of the drugs involved. These updating changes appear in the last paragraph of each of the trafficking instructions and in element 3 of 25.9, 25.11,

and 25.13.

Although no comments were submitted in response to the notice in the Bar News, it should be noted that the notice was published under the title “Proposed civil jury instructions.” Also, some underlining of new wording in the trafficking instructions was omitted. Because of those errors and perhaps because of the significance of the section 893.101 revisions to the instructions, a republication of these changes in the Bar News may be warranted.

## Proposal 2. Revised instructions for offenses based on lewd and lascivious behavior

Instruction 11.10 of Florida Standard Jury Instructions (Criminal) is based on section 800.04, Florida Statutes (1997). In 1999, the legislature revised that law by replacing “Lewd, lascivious, or indecent assault or act upon or in presence of child” with “Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.” See Ch. 99-20, § 6, Laws of Florida. The 1999 law created four categories of “lewd or lascivious” offenses. In chapter 00-246, section 1, Laws of Florida, the 1999 provision was amended with the creation of an offense based on lewd or lascivious behavior conducted through the use of computer technology.

Assistant State Attorney Michael Sinacore submitted a set of revised instructions to the committee based on the current statute. See Appendix D, pages 11 through 18. Except for some minor style changes, the committee approved the revised set of six instructions (11.10(a) through 11.10(f)) to replace instruction 11.10. A notice of the proposed instructions was published in the September 15, 2002, Bar News. See Appendix B, pages 6 and 7. No comments were received in response to the notice.

The revised instructions closely follow the statutory wording, and the committee has not identified any issues that should prevent the adoption of the instructions.

### Proposal 3. Revised instruction on justifiable use of force by law enforcement

In March of 2002, committee member Abe Laeser submitted a letter to the chair of the committee regarding instruction 3.6(h) [formerly 3.04(f)] entitled “Justifiable Use of Force by Law Enforcement Officer. See Appendix D, pages 19 to 21. Mr. Laeser’s letter requests removing language that, in response to *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), was inserted in the instruction in 1985. The language in question is **“In arresting a felon who is fleeing from justice, an officer is justified in the use of any force if 1. the officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or 2. the officer reasonably believes that the fleeing felon has committed a crime involving the infliction or the threatened infliction of serious physical harm to another person.”** Mr. Laeser notes that *Tennessee v. Garner* involved a civil action and that its holding does not apply to criminal prosecutions.

The history of the instruction between 1985 and 1989 is a bit convoluted. After the 1985 change was approved, the committee was asked to reconsider the *Tennessee v. Garner* language in a letter from William C. Vose to Judge Rom Powell. See Appendix D, pages 22 through 27. By the time the committee considered that letter, the legislature had amended section 776.05, Florida Statutes, in chapter 87-147, section 1, Laws of Florida. That amended law appeared to codify the *Tennessee v. Garner* holding and to apply it to both civil and criminal cases. Because of that amendment, the committee rejected the suggestion of Mr. Vose. Instead, it decided that the instruction needed to be changed to more closely follow the statutory wording (for example, “suspected felon” was changed to “felon”). The legislature in the meantime was amending the statute once again in chapter 88-381, section 54, Laws of Florida. That 1988 amendment makes the *Tennessee v. Garner* language applicable only to civil actions. The committee, however, failed to notice the 1988 change and sought approval of its amended instruction based on the 1987 law. The court approved those changes in March 1989. *In re Standard Jury Instructions in Criminal Cases*, 543 So. 2d 1205 (Fla. 1989). The instruction, therefore, fails to reflect the wording of the current statute.

Although the committee has not found any appellate decisions in which the 1985 or 1989 instructions have been challenged, the unanimous opinion of the committee is that the instruction should now be amended to reflect the law as currently provided in section 776.05, Florida Statutes. In making this proposal, the committee disagrees with the 1985 decision of the committee when it incorporated

the *Tennessee v. Garner* holding into the instruction. Instead, the committee now agrees with the legislature's interpretation indicated in section 776.05 to the effect that *Tennessee v. Garner* is applicable only to civil actions.

The notice of the proposed change was published in the November 1, 2002, Bar News. See Appendix B, page 8. No comments were received in response to the notice.



#### Proposal 4. Removal of an obsolescent drug abuse instruction

*Ozell v. State*, 28 Fla. L. Weekly D440 (Fla. 3d DCA, February 12, 2003), contains the following footnote:

[We urge the Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases to review the quoted jury instructions with a view to clarifying whether the instruction entitled Drug Abuse--Possession on or Near School F.S. 893.13(1)(e) should have been deleted at the time the new standard jury instruction was approved in 2000. 765 So. 2d at 700. It may also be prudent to review the neighboring instructions so as to eliminate any others that may be obsolete or contain obsolete statutory references.]

As suggested in the footnote, the instruction entitled “Drug Abuse— Possession on or Near School F.S. 893.13(1)(e)” probably should have been removed when the instruction entitled “Contraband in Specified Locations” was approved. The former instruction was created for cases involving section 893.13 (1)(e), which was created by section 4, chapter 87-243, Laws of Florida. That section of the statutes was renumbered and amended in 1993. Other specified locations have also been added to 893.13, and the “Contraband in Specified Locations” instruction was intended for those cases based on section 893.13(1)(c) through 893.13(e), Florida Statutes (1997). That instruction appears in the 2002 edition of Florida Standard Jury Instructions In Criminal Cases under the title “DRUG ABUSE - SALE, PURCHASE, MANUFACTURE, OR DELIVERY IN SPECIFIED LOCATIONS.”(Changes to that instruction are submitted in proposal 1 of this report. )

Few if any charges under the 1987 to 1993 law are still being tried. In any case, when proposing updated instructions, the committee usually has proposed removal of the instructions that are no longer supported by the current law. It therefore is recommended that the instruction entitled “Drug Abuse — Possession on or Near School F.S. 893.13(1)(e)” be deleted.

**APPENDIX A**  
**PROPOSED REVISIONS**

## **Proposal 1. Revised instructions on drug abuse offenses**

### **25.2 DRUG ABUSE — SALE, PURCHASE, MANUFACTURE, DELIVERY, OR POSSESSION WITH INTENT**

§ 893.13(1)(a), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt:**

**1. (Defendant)**

**[sold]**

**[purchased]**

**[manufactured]**

**[delivered]**

**[possessed with intent to sell]**

**[possessed with the intent to purchase]**

**[possessed with intent to manufacture]**

**[possessed with intent to deliver]**

**a certain substance.**

**2. The substance was (specific substance alleged).**

*Give if possession is charged*

**3. (Defendant) had knowledge of the presence of the substance.**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.**

*Deliver § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

*Possession*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence ; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the**

defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.

### **25.3 DRUG ABUSE - SALE, PURCHASE, DELIVERY, OR POSSESSION IN EXCESS OF TEN GRAMS**

§ 893.13(1)(b), Fla.Stat.

*This instruction will have to be altered if a combination of substances is alleged.*

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt:**

**1. (Defendant)**

**[sold]**

**[purchased]**

**[delivered]**

**[possessed]**

**more than 10 grams of a certain substance.**

**2. The substance was (specific substance alleged).**

*Give if possession is charged*

**3. (Defendant) had knowledge of the presence of the substance.**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Deliver § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

*Possession*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

(a) the thing is in the hand of or on the person, or  
(b) the thing is in a container in the hand of or on the person, or  
(c) the thing is so close as to be within ready reach and is under the control of the person.

*Give if applicable*

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.

Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.

## **25.4 DRUG ABUSE — DELIVERY TO OR USE OF MINOR**

§ 893.13(1)(c), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:**

**1. a. [(Defendant) delivered a certain substance to a person under the age of 18 years.]**

*Give 1a, 1b, or 1c as applicable*

**b. [(Defendant) used or hired a person under the age of 18 years as an agent or employee in the sale or delivery of a certain substance.]**

**c. [(Defendant) used a person under the age of 18 years to assist in avoiding detection or apprehension for (violation of Chapter 893, Fla.Stat., alleged).]**

**2. The substance was (specific substance alleged).**

**3. (Defendant) was 18 years of age or older at the time.**

*Definition § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

## **25.5 DRUG ABUSE - BRINGING INTO STATE**

§ 893.13(1)(d), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) brought a certain substance into Florida.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) had knowledge of the presence of the substance.**

*Definition*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence ; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of**



its presence may not be inferred or assumed.

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

## **25.6 DRUG ABUSE - SALE, PURCHASE, MANUFACTURE, OR DELIVERY IN SPECIFIED LOCATIONS**

§ 893.13(1)(c), (d), ~~and (e)~~, and (f), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances."** (Specific substance alleged) **is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Defendant)**  
**[sold]**  
**[manufactured]**  
**[delivered]**  
**[possessed with intent to sell]**  
**[possessed with intent to manufacture]**  
**[possessed with intent to deliver]**  
**a certain substance.**  
*Give a, b or c as applicable*
- 2. a. in, on, or within 1,000 feet of the real property comprising a child care facility or a public or private elementary, middle, or secondary school between the hours of 6:00 a.m. to 12:00 a.m.**  
*(§ 893.13(1)(c), Fla.Stat.)*  
**b. in, on, or within 200 feet of [the real property comprising a public housing facility] [the real property comprising a public or private college, university, or other postsecondary educational institution] [a public park].** *(§ 893.13(1)(d), Fla.Stat.)*  
**c. in, on, or within 1000 feet of [a physical place for worship at which a church or religious organization regularly conducts a religious services] [a convenience business].** *(§ 893.13(1)(e), Fla.Stat.)*
- 3. The substance was (specific substance alleged).**
- 4. (Defendant) had knowledge of the presence of the substance.**  
*Definitions; give as applicable.*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

**"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.**

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means:**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable.*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of**

**the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*Definitions; give as applicable*

**"Child care facility" means any child care center or arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care. It does not matter if the child care facility is operated for profit or as a nonprofit operation.**

**A "convenience business" means any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term does not include any of the following: a business that is primarily a restaurant, or one that always has at least five employees on the premises after 11 p.m. and before 5 a.m., or one that has at least 10,000 square feet of retail floor space. The term "convenience business" also does not include any business in which the owner or members of his family work between the hours of 11 p.m. and 5 a.m.**

**The term "real property comprising a public housing facility" is defined as the real property of a public corporation created as a housing authority by statute.**

## **25.7 DRUG ABUSE - POSSESSION**

§ 893.13(1)(f), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of (crime charged), the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) possessed a certain substance.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) had knowledge of the presence of the substance.**

### *Definition*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

### *Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence ; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

Give if applicable — § 893.101(2) and (3), Fla.Stat.

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

## **25.8 DRUG ABUSE — OBTAINING CONTROLLED SUBSTANCE BY FRAUD, ETC.**

§ 893.13(3)(a)1, Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) is a controlled substance.**

**To prove the crime of Obtaining a Controlled Substance by [misrepresentation] [forgery] [deception] [subterfuge] the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Defendant) [acquired or obtained] [attempted to acquire or obtain] possession of a certain substance.**
- 2. The substance was (specific substance alleged).**
- 3. (Defendant) [acquired or obtained] [attempted to acquire or obtain] the substance by  
[misrepresentation].  
[fraud].  
[forgery].  
[deception].  
[subterfuge].**

*Give if applicable — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

## 25.9 TRAFFICKING IN CANNABIS

§ 893.135(1)(a), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." Cannabis is a controlled substance.**

**To prove the crime of Trafficking in Cannabis, the State must prove the following four elements beyond a reasonable doubt:**

1. (Defendant) **knowingly**  
[sold]  
[purchased]  
[manufactured]  
[delivered]  
[brought into Florida]  
[possessed]  
**a certain substance.**
2. **The substance was cannabis.**
3. **[The quantity of the cannabis involved was in excess of 5025 pounds.] [The quantity of the cannabis was 300 or more cannabis plants.]**

*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*

4. (Defendant) **knew that the substance was cannabis.**

*If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin, but actually sold cannabis, the alternate element 4 would be given.*

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] cannabis.]**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging,**



labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

*Deliver § 893.02(5), Fla.Stat.*

"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

*Possession*

To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or
- (b) the thing is in a container in the hand of or on the person, or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

*Give if applicable*

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

*Give only if the defendant asserts the affirmative defense of lack of*

knowledge of the illicit nature of the substance – § 893.101(2) and (3), Fla.Stat.

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*See State v. Weller, 590 So.2d 923 (Fla. 1991)*

**The punishment provided by law for the crime of Trafficking in Cannabis is greater depending on the amount of cannabis involved. Therefore, if you find the defendant guilty of trafficking in cannabis, you must determine by your verdict whether:**

*Enhanced penalty; give if applicable up to extent of charge*

- a. **[The quantity of the substance cannabis involved was in excess of 5025 pounds but less than 2,000 pounds.] [The quantity of the cannabis involved was 300 or more cannabis plants but not more than 2,000 plants.]**
- b. **[The quantity of the substance involved was 2,000 pounds or more but less than 10,000 pounds.] [The quantity of the cannabis involved was 2000 or more cannabis plants but not more than 10,000 plants.]**
- c. **[The quantity of the substance involved was 10,000 pounds or more.] [The quantity of the cannabis involved was 10,000 or more plants.]**

## 25.10 TRAFFICKING IN COCAINE

§ 893.135(1)(b), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." Cocaine or any mixture containing cocaine is a controlled substance.**

**To prove the crime of Trafficking in Cocaine, the State must prove the following four elements beyond a reasonable doubt:**

1. (Defendant) **knowingly**  
[sold]  
[purchased]  
[manufactured]  
[delivered]  
[brought into Florida]  
[possessed]

**a certain substance.**

2. **The substance was [cocaine] [a mixture containing cocaine].**
3. **The quantity of the substance involved was 28 grams or more.**

*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*

4. (Defendant) **knew that the substance was [cocaine] [a mixture containing cocaine].**

*If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold cocaine, the alternate element 4 would be given.*

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] cocaine or a mixture containing cocaine.]**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging,**

labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

*Deliver § 893.02(5), Fla.Stat.*

"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

*Possession*

To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means

- (a) the thing is in the hand of or on the person, or
- (b) the thing is in a container in the hand of or on the person, or
- (c) the thing is so close as to be within ready reach and is under the control of the person.

*Give if applicable*

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

*Give only if the defendant asserts the affirmative defense of lack of*

*knowledge of the illicit nature of the substance – § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*See State v. Weller, 590 So.2d 923 (Fla. 1991)*

**The punishment provided by law for the crime of Trafficking in Cocaine is greater depending on the amount of cocaine involved. Therefore, if you find the defendant guilty of trafficking in cocaine, you must determine by your verdict whether:**

*Enhanced penalty; give if applicable up to extent of charge*

- a. [The quantity of the substance involved was in excess of 28 grams but less than 200 grams.]
- b. [The quantity of the substance involved was 200 grams or more but less than 400 grams.]
- c. [The quantity of the substance involved was 400 grams or more but less than 150 kilograms.]
- d. [The quantity of the substance involved was 150 kilograms or more ~~but less than 300 kilograms.~~]

## 25.11 TRAFFICKING IN ILLEGAL DRUGS

§ 893.135(1)(c), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." (Specific substance alleged) or any mixture containing (specific substance alleged) is a controlled substance.**

**To prove the crime of Trafficking in Illegal Drugs, the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Defendant) knowingly**  
[sold]  
[purchased]  
[manufactured]  
[delivered]  
[brought into Florida]  
[possessed]  
**a certain substance.**
- 2. The substance was [(specific substance alleged)] [a mixture containing (specific substance alleged)].**
- 3. The quantity of the substance involved was ~~284~~ grams or more.**  
*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*
- 4. (Defendant) knew that the substance was [(specific substance alleged)] [a mixture containing (specific substance alleged)].**

*If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold (specific substance alleged), the alternate element 4 would be given.*

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] (specific substance alleged) or a mixture containing (specific substance alleged).]**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.**

*Deliver § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

Possession

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of**

**its presence may not be inferred or assumed.**

*Give only if the defendant asserts the affirmative defense of lack of knowledge of the illicit nature of the substance — § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*See State v. Weller, 590 So.2d 923 (Fla. 1991)*

**The punishment provided by law for the crime of Trafficking in Illegal Drugs is greater depending on the amount of (specific substance alleged) involved. Therefore, if you find the defendant guilty of trafficking in illegal drugs, you must determine by your verdict whether:**

*Enhanced penalty; give if applicable up to extent of charge*

- a. [The quantity of the substance involved was in excess of 4 grams but less than 14 grams.]
- b. [The quantity of the substance involved was 14 grams or more but less than 28 grams.]
- c. [The quantity of the substance involved was 28 grams or more but less than 30 kilograms.]
- d. [The quantity of the substance involved was 30 kilograms or more ~~but less than 60 kilograms.~~]



## 25.12 TRAFFICKING IN PHENCYCLIDINE

§ 893.135(1)(d), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." Phencyclidine or any mixture containing phencyclidine is a controlled substance.**

**To prove the crime of Trafficking in Phencyclidine, the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Defendant) knowingly**  
**[sold]**  
**[purchased]**  
**[manufactured]**  
**[delivered]**  
**[brought into Florida]**  
**[possessed]**  
**a certain substance.**
- 2. The substance was [phencyclidine] [a mixture containing phencyclidine].**
- 3. The quantity of the substance involved was 28 grams or more.**  
*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*
- 4. (Defendant) knew that the substance was [phencyclidine] [a mixture containing phencyclidine].**

*If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold phencyclidine, the alternate element 4 would be given.*

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] phencyclidine or a mixture containing phencyclidine.]**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.**

*Deliver § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

*Possession*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence ; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

Give only if the defendant asserts the affirmative defense of lack of knowledge of the illicit nature of the substance – § 893.101(2) and (3), Fla.Stat.

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*See State v. Weller, 590 So.2d 923 (Fla. 1991)*

**The punishment provided by law for the crime of Trafficking in Phencyclidine is greater depending on the amount of phencyclidine involved. Therefore, if you find the defendant guilty of trafficking in phencyclidine, you must determine by your verdict whether:**

*Enhanced penalty; give if applicable up to extent of charge*

- a. [The quantity of the substance involved was in excess of 28 grams but less than 200 grams.]
- b. [The quantity of the substance involved was 200 grams or more but less than 400 grams.]
- c. [The quantity of the substance involved was 400 grams or more but less than 800 grams.]

## 25.13 TRAFFICKING IN METHAQUALONE

§ 893.135(1)(e), Fla.Stat.

**Certain drugs and chemical substances are by law known as "controlled substances." Methaqualone or any mixture containing methaqualone is a controlled substance.**

**To prove the crime of Trafficking in Methaqualone, the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Defendant) knowingly**  
[sold]  
[purchased]  
[manufactured]  
[delivered]  
[brought into Florida]  
[possessed]  
**a certain substance.**
- 2. The substance was [methaqualone] [a mixture containing methaqualone].**
- 3. The quantity of the substance involved was ~~28~~200 grams or more.**

*See State v. Dominguez, 509 So.2d 917 (Fla. 1987)*

- 4. (Defendant) knew that the substance was [methaqualone] [a mixture containing methaqualone].**

*If applicable under the facts of the case and pursuant to § 893.135(2), Fla.Stat., the following bracketed language should be given instead of element 4 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold methaqualone, the alternate element 4 would be given.*

- [4. (Defendant) intended to [sell] [purchase] [manufacture] [deliver] [bring into Florida] [possess] (an enumerated controlled substance in § 893.135(1), Fla.Stat.), but actually [sold] [purchased] [manufactured] [delivered] [brought into Florida] [possessed] methaqualone or a mixture containing methaqualone.]**

*Definitions; give as applicable*

*Sell*

**"Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.**

*Manufacture § 893.02(12)(a), Fla.Stat.*

**"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.**

*Deliver § 893.02(5), Fla.Stat.*

**"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.**

*Possession*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence ; ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of**

its presence may not be inferred or assumed.

*Give only if the defendant asserts the affirmative defense of lack of knowledge of the illicit nature of the substance – § 893.101(2) and (3), Fla.Stat.*

**An issue in this case is whether (defendant) knew of the illicit nature of the substance. Lack of knowledge of the illicit nature of the substance is a defense and the State must prove beyond a reasonable doubt that the defendant had such knowledge.**

**Proof that the defendant actually or constructively possessed the (controlled substance alleged in the charge) may justify a finding that the defendant knew of its illicit nature if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the defendant had such knowledge.**

*See State v. Weller, 590 So.2d 923 (Fla. 1991)*

The punishment provided by law for the crime of Trafficking in Methaqualone is greater depending on the amount of methaqualone involved. Therefore, if you find the defendant guilty of trafficking in methaqualone, you must determine by your verdict whether:

*Enhanced penalty; give if applicable up to extent of charge*

- a. [The quantity of the substance involved was in excess of 200 grams but less than 5 kilograms.]
- b. [The quantity of the substance involved was 5 kilograms or more but less than 25 kilograms.]
- c. [The quantity of the substance involved was 25 kilograms or more ~~but less than 50 kilograms.~~]

## **25.14 DRUG ABUSE - USE OR POSSESSION OF DRUG PARAPHERNALIA**

§ 893.147(1), Fla.Stat.

**To prove the crime of Use or Possession of Drug Paraphernalia, the State must prove the following two elements beyond a reasonable doubt:**

- 1. (Defendant) used or had in [his] [her] possession with intent to use drug paraphernalia.**
- 2. (Defendant) had knowledge of the presence of the drug paraphernalia.**

### *Definitions*

#### *Possession*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

- (a) the thing is in the hand of or on the person, or**
- (b) the thing is in a container in the hand of or on the person, or**
- (c) the thing is so close as to be within ready reach and is under the control of the person.**

#### *Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

**If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~**

**Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.**

**If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.**

**If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.**

*Drug paraphernalia § 893.145, Fla.Stat.*

**The term "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:**

*Give specific definition as applicable*

**(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.**

**(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.**

**(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.**

**(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.**

**(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.**

**(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.**

**(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.**

**(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.**

**(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.**



**(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.**

**(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.**

**(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:**

**(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.**

**(b) Water pipes.**

**(c) Carburetion tubes and devices.**

**(d) Smoking and carburetion masks.**

**(e) Roach clips: meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.**

**(f) Miniature cocaine spoons, and cocaine vials.**

**(g) Chamber pipes.**

**(h) Carburetor pipes.**

**(i) Electric pipes.**

**(j) Air-driven pipes.**

**(k) Chillums.**

**(l) Bongs.**

**(m) Ice pipes or chillers.**

*Relevant factors § 893.146, Fla.Stat.*

**In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:**

**(1) Statements by an owner or by anyone in control of the object concerning its use.**

**(2) The proximity of the object, in time and space, to a direct violation of this act.**

**(3) The proximity of the object to controlled substances.**

**(4) The existence of any residue of controlled substances on the object.**

**(5) Direct or circumstantial evidence of the intent of an owner, or of**

**anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**

**(6) Instructions, oral or written, provided with the object concerning its use.**

**(7) Descriptive materials accompanying the object which explain or depict its use.**

**(8) Any advertising concerning its use.**

**(9) The manner in which the object is displayed for sale.**

**(10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.**

**(11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.**

**(12) The existence and scope of legitimate uses for the object in the community.**

**(13) Expert testimony concerning its use.**

**25.15 DRUG ABUSE - DELIVERY, POSSESSION WITH  
INTENT TO DELIVER, OR MANUFACTURE WITH  
INTENT TO DELIVER DRUG PARAPHERNALIA**

§ 893.147(2), Fla.Stat.

**To prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt:**

**1. (Defendant)**

**[delivered]**

**[possessed with intent to deliver]**

**[manufactured with intent to deliver]**

**drug paraphernalia.**

*Give only if possession is charged*

**2. (Defendant) had knowledge of the presence of the drug paraphernalia.**

**3. (Defendant) knew or reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body (specific substance alleged).**

*Definitions*

*Possession; give if possession is charged*

**To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.**

**Possession may be actual or constructive.**

**Actual possession means**

**(a) the thing is in the hand of or on the person, or**

**(b) the thing is in a container in the hand of or on the person, or**

**(c) the thing is so close as to be within ready reach and is under**

**the control of the person.**

*Give if applicable*

**Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.**

**Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.**

*Give if applicable. See Chicone v. State, 684 So.2d 736 (Fla. 1996)*

If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing; and (2) knowledge that the thing was within the person's presence, ~~and (3) knowledge of the illicit nature of the thing.~~

Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

*Deliver; give if delivery is charged § 893.02(4), Fla.Stat.*

"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

*Manufacture; give if manufacture is charged § 893.02(11)(a), Fla.Stat.*

"Manufacture" means the production, preparation, packaging, labeling or relabeling, propagation, compounding, cultivating, growing, conversion or processing of a controlled substance, either directly or indirectly. Manufacturing can be by extraction from substances of natural origin, or independently by means of chemical synthesis. It can also be by a combination of extraction and chemical synthesis.

*Drug paraphernalia § 893.145, Fla.Stat.*

The term "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in

**manufacturing, compounding, converting, producing, processing, or preparing controlled substances.**

**(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.**

**(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of, controlled substances.**

**(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.**

**(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting controlled substances.**

**(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, cannabis.**

**(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.**

**(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.**

**(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.**

**(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.**

**(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body, such as:**

**(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls.**

**(b) Water pipes.**

**(c) Carburetion tubes and devices.**

**(d) Smoking and carburetion masks.**

(e) **Roach clips:** meaning objects used to hold burning material, such as a cannabis cigarette, that has become too small or too short to be held in the hand.

(f) **Miniature cocaine spoons, and cocaine vials.**

(g) **Chamber pipes.**

(h) **Carburetor pipes.**

(i) **Electric pipes.**

(j) **Air-driven pipes.**

(k) **Chillums.**

(l) **Bongs.**

(m) **Ice pipes or chillers.**

*Relevant factors § 893.146, Fla.Stat.*

**In addition to all other logically relevant factors, the following factors shall be considered in determining whether an object is drug paraphernalia:**

(1) **Statements by an owner or by anyone in control of the object concerning its use.**

(2) **The proximity of the object, in time and space, to a direct violation of this act.**

(3) **The proximity of the object to controlled substances.**

(4) **The existence of any residue of controlled substances on the object.**

(5) **Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom [he] [she] knows, or should reasonably know, intend to use the object to facilitate a violation of this act. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use, as drug paraphernalia.**

(6) **Instructions, oral or written, provided with the object concerning its use.**

(7) **Descriptive materials accompanying the object which explain or depict its use.**

(8) **Any advertising concerning its use.**

(9) **The manner in which the object is displayed for sale.**

(10) **Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.**

- (11) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise.**
- (12) The existence and scope of legitimate uses for the object in the community.**
- (13) Expert testimony concerning its use.**

**Proposal 2. Revised instructions for offenses based on lewd and lascivious behavior**

**~~11.10 LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN THE PRESENCE OF CHILD; SEXUAL BATTERY~~**

~~§ 800.04, Fla.Stat.~~

**~~To prove the crime of (crime charged), the State must prove the following two elements beyond a reasonable doubt:~~**

**~~1. — (Victim) was under the age of 16 years.~~**

*Give as applicable*

**~~2. — a. — (Defendant)~~**

*Subsection (1)*

**~~[made an assault upon (victim) in a lewd, lascivious, or indecent manner].~~**

**~~[handled or fondled (victim) in a lewd, lascivious, or indecent manner].~~**

*Subsection (2)*

**~~b. — (Defendant) committed upon (victim) or forced or enticed (victim) to commit~~**

**~~[actual or simulated sexual intercourse].~~**

**~~[deviate sexual intercourse].~~**

**~~[sexual bestiality].~~**

**~~[masturbation].~~**

**~~[sodomasochistic abuse].~~**



~~[actual lewd exhibition of the genitals].~~

~~[any act or conduct which simulated that sexual battery was being or would be committed on (victim)].~~

*Subsection (3)*

~~c. — (Defendant)~~

~~[committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of [(victim)] [(defendant)]]].~~

~~[committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object].~~

*Subsection (4)*

~~d. — (Defendant) knowingly committed a lewd or lascivious act in the presence of (victim).~~

*Definitions*

*Give in all cases*

~~Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.~~

*Give when § 800.04(1), Fla.Stat., charged*

~~As used in regard to this offense the words “lewd,” “lascivious,” and “indecent” mean the same thing. They mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.~~

*Give when assault is charged under § 800.04(1), Fla.Stat.*

~~An “assault” is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.~~

*Give when § 800.04(4), Fla.Stat., is charged*

~~As used in regard to this offense the words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.~~

~~“In the presence of” means that (victim) saw, heard, or otherwise sensed that the act was taking place.~~

~~See State v. Werner, 609 So.2d 585 (Fla. 1992).~~

~~Give applicable definitions from § 847.001, Fla.Stat., when § 800.04(2), Fla.Stat., is charged.~~

~~There is no need to make reference to the words “without committing the crime of sexual battery” because this refers to forcible sexual relations. Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983); Chapters 84–86, Laws of Florida.~~

**11.10(a) LEWD OR LASCIVIOUS BATTERY (ENGAGING IN SEXUAL ACTIVITY)**

**§ 800.04(4)(a), Fla.Stat.**

**To prove the crime of lewd or lascivious battery, the State must prove the following two elements beyond a reasonable doubt:**

**1. (Victim) was twelve years of age or older, but under the age of sixteen years.**

**2. a. [(Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]**

**b. [(Defendant) committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]**

**“Union” means contact.**

**However, any act done for bona fide medical purposes is not a lewd or lascivious battery.**

**Neither the victim’s lack of chastity nor the victim’s consent is a defense to the crime charged.**

**11.10(b) LEWD OR LASCIVIOUS BATTERY (ENCOURAGING, FORCING OR ENTICING)**

§ 800.04(4)(b), Fla.Stat.

**To prove the crime of lewd or lascivious battery, the State must prove the following two elements beyond a reasonable doubt:**

- 1. (Victim) was under the age of sixteen years.**
- 2. (Defendant) [encouraged] [forced] [enticed] (victim) to engage in [sodomasochistic abuse] [sexual bestiality] [prostitution] [any act involving sexual activity].**

**“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.**

**“Union” means contact.**

**“Sadomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by a Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

**“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other. Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

### **11.10(c) LEWD OR LASCIVIOUS MOLESTATION**

**§ 800.04(5), Fla.Stat.**

**To prove the crime of lewd or lascivious molestation, the State must prove the following two elements beyond a reasonable doubt:**

- 1. (Victim) was under the age of sixteen years.**
- 2. a. [(Defendant) intentionally touched in a lewd or lascivious manner the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (victim).]**  
**b. [(Defendant) [forced] [enticed] (victim) to touch the [breasts] [genitals] [genital area] [buttocks] [clothing covering the breasts] [clothing covering the genitals] [clothing covering the genital area] [clothing covering the buttocks] of (defendant).]**

**The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

**Neither the victim’s lack of chastity nor the victim’s consent is a defense to the crime charged.**

**The punishment provided by law for the crime of lewd or lascivious molestation is greater depending on the age of the defendant and the age of the victim. Therefore, if you find the defendant is guilty of lewd or lascivious molestation, you must determine by your verdict whether at the time of the offense:**

- a. [The defendant was eighteen years of age or older and the victim was under the age of twelve years.]**
- b. [The defendant was under the age of eighteen years and the victim was under the age of twelve years.]**
- c. [The defendant was eighteen years of age or older and the victim was twelve years of age or older.]**
- d. [The defendant was under the age of eighteen years and the victim was twelve years of age or older.]**

**Note: “but under the age of sixteen years” omitted from subparagraphs c. and d. because it is included in the elements of the crime.**

### **11.10(d) LEWD OR LASCIVIOUS CONDUCT**

**§ 800.04(6), Fla.Stat.**

**To prove the crime of lewd or lascivious conduct, the State must prove the following two elements beyond a reasonable doubt:**

- 1. (Victim) was under the age of sixteen years.**
- 2. a. [(Defendant) intentionally touched (victim) in a lewd or lascivious manner.] or**  
**b. [(Defendant) solicited (victim) to commit a lewd or lascivious act.]**

**The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

**To “solicit” means to ask earnestly or to try to induce the person solicited to do the thing solicited. Note: Definition of “solicit” from Criminal Solicitation instruction, § 777.04(2), Fla.Stat.**

**Neither the victim’s lack of chastity nor the victim’s consent is a defense to the crime charged.**

**The punishment provided by law for the crime of lewd or lascivious conduct is greater depending on the age of the defendant. Therefore, if you find the defendant is guilty of lewd or lascivious conduct, you must determine by your verdict whether at the time of the offense:**

- a. The defendant was eighteen years of age or older.**
- b. The defendant was under the age of eighteen years.**

**11.10(e) LEWD OR LASCIVIOUS EXHIBITION (PRESENCE OF CHILD)**

**§ 800.04(7)(a), Fla.Stat.**

**To prove the crime of lewd or lascivious exhibition, the State must prove the following three elements beyond a reasonable doubt:**

- 1. (Victim) was under the age of sixteen years.**
- 2. a. [(Defendant) intentionally masturbated.]**  
**b. [(Defendant) intentionally exposed [his] [her] genitals in a lewd or lascivious manner.]**  
**c. [(Defendant) committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).]**
- 3. The act was committed in the presence of (victim).**

**The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

**“Sodomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by a Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

**“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other. Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by a Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

**“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.**

**“In the presence of” means that the victim saw, heard, or otherwise sensed that the act was taking place. Note: See State v. Werner, 609 So.2d 585 (Fla. 1992). This definition was used for the instruction for Lewd, Lascivious, Indecent Assault or Act Upon or in the Presence of Child; Sexual Battery § 800.04.**

**Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.**

**The punishment provided by law for the crime of lewd or lascivious exhibition is greater depending on the age of the defendant. Therefore, if you find the defendant is guilty of lewd or lascivious exhibition, you must determine by your verdict whether at the time of the offense:**

- a. The defendant was eighteen years of age or older.**
- b. The defendant was under the age of eighteen years.**



**11.10(f) LEWD OR LASCIVIOUS EXHIBITION (OVER COMPUTER SERVICE)**

§ 800.04(7)(b), Fla.Stat.

**To prove the crime of lewd or lascivious exhibition, the State must prove the following four elements beyond a reasonable doubt:**

- 1. (Victim) was under the age of sixteen years.**
- 2. a. [(Defendant) intentionally masturbated.]**  
**b. [(Defendant) intentionally exposed [his] [her] genitals in a lewd or lascivious manner.]**  
**c. [(Defendant) committed [a sexual act] [sodomasochistic abuse] [sexual bestiality] [simulation of any act involving sexual activity] that did not involve actual physical or sexual contact with (victim).]**
- 3. The act was committed live over a [computer on-line service] [internet service] [local bulletin board service].**
- 4. (Defendant) [knew] [should have known] [had reason to believe] that the transmission was viewed on a computer or television monitor by a victim in this state who was under the age of sixteen years.**

**The words “lewd” and “lascivious” mean the same thing and mean a wicked, lustful, unchaste, licentious, or sensual intent on the part of the person doing an act.**

**“Sodomasochistic abuse” means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by a Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

**“Sexual bestiality” means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other.**

**Note: Definition from § 827.071(d), Fla.Stat., Sexual Performance by a Child, and from § 847.001(13), Fla.Stat., regarding obscenity.**

**“Sexual activity” means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.**

Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.

The fact that an undercover operative or law enforcement officer was involved in the detection and investigation of an offense is not a defense to the crime charged.

The punishment provided by law for the crime of lewd or lascivious exhibition is greater depending on the age of the defendant. Therefore, if you find the defendant is guilty of lewd or lascivious exhibition, you must determine by your verdict whether at the time of the offense:

- a. The defendant was eighteen years of age or older.
- b. The defendant was under the age of eighteen years.

**Proposal 3. Revised instruction on justifiable use of force by law enforcement**

**3.6(h) JUSTIFIABLE USE OF FORCE BY LAW ENFORCEMENT OFFICER**

*In making an arrest of a felon § 776.05, Fla.Stat. Give if applicable*

A law enforcement officer, or any person [he] [she] has summoned or directed to assist [him] [her], need not retreat from or stop efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force that [he] [she] reasonably believes necessary to defend [himself] [herself] or another from bodily harm while making the arrest. That force is also justifiable when necessarily used

1. in retaking a felon who has escaped or
2. in arresting a felon who is fleeing from justice.

*Force in making unlawful arrest prohibited § 776.051(2), Fla.Stat.*

Use of any force by a law enforcement officer or any person summoned or directed to assist the law enforcement officer is not justified if  
*Give if applicable*

1. the arrest is unlawful and
2. it is known by the officer or the person assisting [him] [her] to be unlawful.

~~*In making an arrest of a fleeing felon. Give 1 or 2 as applicable. Define felon*~~

~~In arresting a felon who is fleeing from justice, an officer is justified in the use of any force if~~

- ~~1. the officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others;~~
- ~~or~~
- ~~2. the officer reasonably believes that the fleeing felon has committed a crime involving the infliction or the threatened infliction of serious physical harm to another person.~~

~~*To prevent escape from custody § 776.07(1), Fla.Stat. Give if applicable*~~

A law enforcement officer or other person who has an arrested person in [his] [her] custody is justified in the use of any force that [he] [she] reasonably believes to be necessary to prevent the escape of the arrested

**person from custody.**

*To prevent escape from penal institution § 776.07(2), Fla.Stat. Give if applicable*

**A guard or other law enforcement officer is justified in the use of any force that [he] [she] reasonably believes to be necessary to prevent an escape from a penal institution of a person the officer reasonably believes is lawfully detained.**

*Give if applicable*

**“Deadly force” includes, but is not limited to**

- 1. firing a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm; and § 776.06(1)(a), Fla.Stat.**
- 2. firing a firearm at a vehicle in which the person to be arrested is riding. § 776.06(1)(b), Fla.Stat.**

*Definition; give if applicable*

**A “firearm” is legally defined as** (adapt from § 790.001(6), Fla.Stat., as required by allegations).

## **Proposal 4. Removal of an obsolescent drug abuse instruction**

### **~~DRUG ABUSE — POSSESSION ON OR NEAR SCHOOL~~**

**F.S. 893.13(1)(e)**

**~~Before you can find the defendant guilty of (crime charged) the State must prove the following three elements beyond a reasonable doubt:~~**

**Elements**

**~~1. — (Defendant)~~**

**~~[sold]~~**

**~~[purchased]~~**

**~~[manufactured]~~**

**~~[delivered]~~**

**~~[possessed with intent to sell]~~**

**~~[possessed with intent to purchase]~~**

**~~[possessed with intent to manufacture]~~**

**~~[possessed with intent to deliver]~~**

**~~2. — a controlled substance (specific substance alleged)~~**

**~~3. — in, on, or within 1000 feet of the real property comprising a public or private elementary, middle, or secondary school.~~**

**Definitions; give as applicable**

**Sell**

**~~“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.~~**

**Deliver F.S. 893.02(5)**

**~~“Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.~~**

**Possession**

**~~To “possess” means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.~~**

**~~Possession may be actual or constructive.~~**

**~~Actual possession means~~**

**~~(a) the thing is in the hand of or on the person, or~~**

**~~(b) the thing is in a container in the hand of or on the person, or~~**

~~(c) the thing is so close as to be within ready reach and is under the control of the person.~~

~~Give if applicable~~

~~Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.~~

~~Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.~~

~~Give if applicable~~

~~See Chicone v. State, 684 So.2d 736 (Fla. 1996)~~

~~If a thing is in a place over which the person does not have control, in order to establish constructive possession the State must prove the person's (1) control over the thing, (2) knowledge that the thing was within the person's presence, and (3) knowledge of the illicit nature of the thing.~~

~~Possession may be joint, that is, two or more persons may jointly have possession of an article, exercising control over it. In that case, each of those persons is considered to be in possession of that article.~~

~~If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.~~

~~If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.~~

~~Note to Judge:~~

~~If the defense seeks to show a lack of knowledge as to the nature of a particular drug, an additional instruction may be required. See State v. Medlin, 273 So.2d 394 (Fla. 1973).~~

**APPENDIX B**  
**The Florida Bar *News* PUBLICATIONS**

**APPENDIX C**  
**MINUTES EXCERPTS**



April 5, 2002  
CRIMINAL JURY INSTRUCTIONS COMMITTEE  
Tampa Airport Marriott Hotel

...

**III. Possession of Contraband - Knowledge of Illicit Substance**

The court asked the committee to review the drug instructions in light of *Scott v. State*, 808 So.2d 166 (Fla. 2002) and related opinions. Judge Costello led the discussion and noted that the legislature had recently passed House Bill 1935 that states that *Scott* is contrary to legislative intent. The new law also states: "Lack of knowledge of the illicit nature . . . is an affirmative defense." After discussion the committee agreed that no changes in the instruction should be made based on *Scott*. It also was decided that some changes in the instruction may be needed to reflect the changes in the law. Judge Padovano will write a letter to the court to advise the justices of the committee's decision and to request further guidance from the court. The letter will also advise the court of the need for amendments to the instruction based on the new law.

The committee discussed in particular the legislative use of the term "permissive presumption" that will apply when knowledge of the illicit nature of the drug is in dispute. Professor Yetter agreed to review the law related to permissive presumptions and will prepare a report for the next meeting.

...

July 19, 2002  
CRIMINAL JURY INSTRUCTIONS COMMITTEE  
Tampa Airport Marriott Hotel

...

**III. Possession of Contraband - Knowledge of Illicit Substance**

The committee reviewed House Bill 1935. Professor Yetter handed out a memorandum and reviewed the case law and the new statute. After discussion, the committee approved basic changes to the Chapter 893 instructions. Professor Yetter agreed to incorporate the changes into all of those instructions, and the amendments will then be published in the Bar News.

**IV. Lewd and Lascivious Instructions.**

The committee reviewed the instructions drafted by Michael Sinacore. After discussion, the instructions were approved as drafted. The instructions will be published in the Bar News for comment.

November 15, 2002  
CRIMINAL JURY INSTRUCTIONS COMMITTEE  
Tampa Airport Marriott Hotel

...

**III. Instructions Published Since the Last Meeting.**

Proposed changes to drug abuse instructions and to instructions on lewd and lascivious offenses were published for comment September 15. A revised instruction on justifiable use of force by law enforcement officer was published for comment November 1, 2002. No comments have been received. The committee agreed that the proposed instructions are ready to submit to the court.

...

**APPENDIX D**  
**MATERIALS CONSIDERED BY THE COMMITTEE**